DATE: January 12, 1999

CASE NO: 1998-INA-74

In the Matter of

DON COLLINS
Employer

on behalf of

JOSE D. BRIONES VELASQUEZ
Alien

Appearances: Margaret Wilson de Pascual, Esq.
for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Don Collins' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 24, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Jose D. Briones Velasquez. The job opportunity was listed as "Thoroughbred/Qtr. Race Horse Groom." The job duties were described as follows:

> Attends to overall care of horses, maintains stalls and tack; disinfects stalls and bedding; does the cleaning, brushing and trimming of horses; administers medicine as needed and inspects and observes the horses' physical condition. Accompanies horses to race track or other places as needed. Responsible for the safety of the horses and nearby workers. Opportunity to earn winnings bonus in addition to the guaranteed wage. Housing available.

(AF 38). The stated job requirements for the position, as set forth on the application, included 2 years experience in the job offered. Special requirements included "split shift required because of training and racing schedule." (Id.).

EDD transmitted a letter of interest from 1 U.S. applicant to the Employer. (AF 37). According to the Employer's Results of Recruitment Report, the applicant was not hired. (AF 48-49). The file was transmitted to the CO. (AF 37).

The CO issued a Notice of Findings ("NOF") on August 19, 1996, proposing to deny certification for two reasons. (AF 33-36). First, the CO found that the Employer's amendments to Form ETA 750 Part A were not valid because the signature on the amendments did not match the signature on the original application. The CO noted that the only acceptable signatures on an application are by individuals who have hiring/firing authority or who set the wages. (AF 34). Second, the CO found that the Employer failed to recruit in good faith because it only made several attempts to contact applicant Elliott by telephone. (AF 35).

The Employer submitted its rebuttal dated September 23, 1996, which provided the following information. (AF 23-32). The Employer is Don and Dee Collins. Mrs. Collins is running the business. The amendments were signed by Curly Ortiz, Mrs. Collins' assistant trainer. (AF 23). The Employer submitted a signed statement by "D. Collins" which stated that Curly Ortiz has authorization to sign any documents in this case. He has the authority to hire, fire, discipline, train, etc. any of the employees at the stables. (AF 29). The Employer also argued that it made a good faith effort to contact Ms. Elliott. Since the referral did not give an address, the Employer attempted to contact her by telephone. After several attempts, the Employer left two messages with the babysitter. Ms. Elliott never returned the calls. The final documentation letter which was dated March 15, 1996, was not sent until April 2, which gave Ms. Elliott additional time to contact the Employer. (AF 23-24). In addition, the Employer argued that Ms. Elliott was not qualified for the position because her work experience at the Rancho Del Rio Stables included both race horses and non race horses. (AF 24).

The CO rejected the Employer's rebuttal and issued a Final Determination ("FD") denying certification on October 30, 1996. (AF 20-22).

The Employer submitted a Request for Review dated December 3, 1996. (AF 1-19).

Discussion

Section 656.21(b)(6) states that the employer is required to document that U.S. applicants were rejected solely for lawful job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *Daniel Costiuc*, 94-INA-541 (Feb. 23, 1996); *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, an employer has not proven that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work as required under Section 656.1. An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (*en banc*).

The Employer argues that it made a good faith effort to contact Ms. Elliott by leaving two telephone messages for her. While it did not indicate when the telephone calls took place or provide documentation such as telephone bills[1], the Employer did specify that he spoke with the babysitter. (AF 23-24). Ms. Elliott indicated that the Employer never contacted her. (AF 56). However, this statement does not directly contradict the Employer's position since it is possible that the babysitter never forwarded the messages. The record is clear that the Employer's efforts to reach Ms. Elliott

[1]Since these were local telephone calls, there were no phone records available. (AF 24).

by telephone were not successful. Where attempts to reach an applicant by telephone are not successful, a reasonable effort requires an alternative method of contact, such as mail. *See Delmonico Hotel Co.*, 92-INA-324 (July 20, 1993); *Phototype, Inc.*, 90-INA-63 (May 22, 1991). Here, the Employer argues that it could not contact Ms. Elliott by mail because it only received her telephone number.[2] (AF 23). The Employer may not avoid its obligation simply because it never received the applicant's address; rather, it had a duty to attempt to obtain Ms. Elliott's address. *See Watt TV & VCR Services*, 98-INA-9 (Aug. 19, 1998) (employer could have obtained the applicants' addresses from the state employment agency). Here, EDD obtained Ms. Elliott's address in order to send her a post recruitment questionnaire. (AF 50, 56). The Employer could have made an effort to obtain her address by either contacting EDD, consulting a telephone directory, or by asking the babysitter for the address.

The Employer also argues that Ms. Elliott is not qualified for the job opportunity. According to her letter of interest, Ms. Elliott has been involved with the care of horses since she was 7 years old. She has two years of experience at the Rancho Del Rio Stables, and is experienced with Quarter Horses. (AF 58). The Employer discounts her experience with race horses at the Rancho Del Rio Stables because the stables included both race and non race horses. (AF 24). This argument is disingenuous. Ms. Elliott's qualifying experience cannot be diluted by her additional experience with non race horses. We find that there was a reasonable probability that Ms. Elliott was qualified for the job opportunity. As such, the Employer had a duty to contact her for an interview. *See, e.g., Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*).

We find that the Employer did not make a good faith effort to contact Ms. Elliott. When attempts to contact an applicant by telephone fail, the Employer has a duty to try an alternative method of contact, such as mail. The Employer should have attempted to obtain Ms. Elliott's address, especially since there was only <u>one</u> job applicant.

Since we find that the Employer failed to make a good faith effort to contact Ms. Elliott, it is not necessary to address the issue of whether the Employer's amendments to the application were valid.

Order

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[2]In response to the Employer's advertisement, Ms. Elliott submitted a letter describing her qualifications for the position. The letter included her telephone number but not her address. It appears that someone wrote by hand Ms. Elliott's address on the bottom of the letter. (AF 58). Since the original referral from EDD did not include Ms. Elliott's address, the handwritten address most likely was added after EDD forwarded the letter to the Employer. (AF 47).

The Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California